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SUPREME COURT  
STATE OF WASHINGTON

2008 MAY -1 P 2:24

No. 80259-9

BY RONALD R. CARPENTER

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**  
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TACOMA NARROWS CONSTRUCTORS, a Washington joint venture,  
Respondent,

v.

NIPPON STEEL-KAWADA BRIDGE, INC., a California corporation,  
Respondent,

NIPPON STEEL-KAWADA BRIDGE, INC., a California corporation,  
and NIPPON STEEL/KAWADA JOINT VENTURE, a Japanese joint  
venture,  
Respondents,

v.

TACOMA NARROWS CONSTRUCTORS, a Washington joint venture,  
Respondent,

and

SAMSUNG HEAVY INDUSTRIES CO., LTD., a Korean corporation,  
Petitioner

**SUPPLEMENTAL BRIEF OF  
RESPONDENT TACOMA NARROWS CONSTRUCTORS**

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## I. INTRODUCTION

This litigation arises out of two consolidated cases. The first suit was commenced by plaintiff Tacoma Narrows Constructors against one of its major suppliers, Nippon Steel-Kawada Bridge, Inc. (sometimes known as NSKB). That supplier and its affiliate, Nippon Steel/Kawada Joint Venture (sometimes known as NSKJV), commenced a suit several months later against a subcontractor of theirs, Samsung Heavy Industries, Co. Ltd. (sometimes known as SHI) and Tacoma Narrows Constructors. This appeal concerns the arbitration clause in the SHI contract.

Tacoma Narrows Constructors does not believe it is necessary for it to add to this Court's file a separate Supplemental Brief of its own relating to the interpretation and enforcement of that arbitration clause. Tacoma Narrows Constructors does, however, believe it is important to file a short submission to ensure that this Court is aware of:

- (1) Tacoma Narrows Constructors' position regarding that arbitration clause's effect on its lawsuit, and
- (2) Certain factual misstatements relating to Tacoma Narrows Constructors that were inadvertently included in the Court of Appeals opinion now under review.

## II. DISCUSSION

### A. Tacoma Narrows Constructors' Position Regarding The Arbitration Clause's Effect On Its Lawsuit.

Tacoma Narrows Constructors understands that its lawsuit may be delayed if this Court determines that the SHI dispute should be arbitrated or that the Court of Arbitration of the International Chamber of Commerce must decide the scope of arbitrable issues under the SHI contract's arbitration clause.

Tacoma Narrows Constructors therefore wishes to confirm for the record that it has no objection to, and will not claim prejudicial delay from, this Court determining that the international arbitration clause controls the SHI dispute. That is because Tacoma Narrows Constructors cannot deny that it knew it was entering into the realm of international commerce when it contracted with NSKB, whose parents are large Japanese corporations.

Tacoma Narrows Constructors also recognizes that resolving the SHI dispute in arbitration will likely streamline the litigation of disputes between Tacoma Narrows Constructors and NSKB – a more efficient process that should ultimately serve the Washington Civil Rules' underlying purpose to “secure the just, speedy, and inexpensive determination of every action.” CR 1.

**B. Factual Misstatements Relating To Tacoma Narrows Constructors That Were Inadvertently Included In The Court Of Appeals Opinion.**

Tacoma Narrows Constructors respectfully notes that the material facts between itself and NSKB are hotly contested in this case and that no fact finding has taken place in the trial court. Tacoma Narrows Constructors is entitled to have those factual disputes resolved by jury trial, and there has been no such trial.

Unfortunately, however, the Court of Appeals' background description of the underlying claims in this litigation repeats many *allegations* about Tacoma Narrows Constructors as if they were proven *facts*. Tacoma Narrows brought this situation to the attention of the Court of Appeals.<sup>1</sup> And in responding to that submission by Tacoma Narrows Constructors, NSKB acknowledged that the Court of Appeals' "statements

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<sup>1</sup> *Tacoma Narrows Constructors' Motion To Reconsider Or Clarify Certain Factual Statements In The Court's Opinion That Could Cause Further Confusion In Later Proceedings And Trial, filed May 14, 2007 in Court of Appeals case no. 43901-9-II consolidated with no. 35241-9-II, at pages 4-10; Tacoma Narrows Constructors' Reply In Support Of Motion To Reconsider Or Clarify Certain Factual Statements In The Court's Opinion That Could Cause Further Confusion In Later Proceedings And Trial, filed May 25, 2007 in Court of Appeals case no. 43901-9-II consolidated with no. 35241-9-II, at pages 2-6.*

plainly have no force as law of the case”.<sup>2</sup> Nevertheless, the Court of Appeals denied Tacoma Narrows Constructors’ request for clarification.

The factual misstatements about Tacoma Narrows Constructors in the Court of Appeals opinion include:

- Incorrectly describing NSKB’s scope of work on the project;
- Treating NSKB’s allegations about design of the project as fact when, in reality, those NSKB allegations are at the heart of one of the principal factual disputes between Tacoma Narrows Constructors and NSKB;
- Mischaracterizing the nature and terms of an agreement Tacoma Narrows Constructors reached with SHI when SHI stopped work on the project because of a commercial dispute it was having with NSKJV and NSKB; and
- Mischaracterizing the terms of a letter of credit posted by NSKB for the benefit of Tacoma Narrows Constructors and Tacoma Narrows Constructors’ rights to draw on that letter of credit.

Tacoma Narrows Constructors’ prior submission to the Court of Appeals detailed its basis for the above concerns, including citations to the record, and suggested simple ways that the inadvertently inaccurate statements could be corrected.<sup>3</sup> For example, it suggested inserting the

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<sup>2</sup> *Response Of Plaintiffs/Respondents Nippon Steel-Kawada Bridge, Inc., And Nippon Steel/Kawada Joint Venture To Tacoma Narrows Constructors’ Motion To Reconsider Or Clarify Certain Factual Statements In The Court’s Opinion, filed May 17, 2007 in Court of Appeals case no. 43901-9-II consolidated with no. 35241-9-II, at page 4.*

<sup>3</sup> *Supra, footnote 1.*

phrase “NSKB alleges” or “NSKB claims” when that opinion repeated NSKB’s factual allegations, and deleting other hotly contested “fact” assertions that were immaterial to the issues being decided by the Court of Appeals, which involved the arbitration clause in SHI’s contract.<sup>4</sup> Those suggestions were rejected.

To avoid further confusing the record, Tacoma Narrows Constructors respectfully requests that its right to prove facts in the trial court not be prejudiced, and that whatever opinion this Court ultimately issues accurately reflect that factual allegations and contentions asserted by parties such as NSKB are exactly that – the party’s allegations and contentions – and that those allegations and contentions have yet to be proven at trial.

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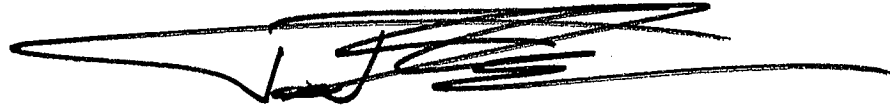
<sup>4</sup> *Supra*, footnote 1.

### III. CONCLUSION

Tacoma Narrows Constructors hopes that this short submission answers any questions this Court may have about Tacoma Narrows Constructors' position regarding the arbitration clause's effect on its lawsuit, and adequately explains why certain statements about Tacoma Narrows Constructors which the Court of Appeals suggested might be proven *fact* are instead NSKB's unproven *allegations*.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of May, 2008.

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**DECLARATION OF SERVICE**

I, Dorothy Oklatir, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on May 1, 2008, a true and correct copy of the **SUPPLEMENTAL BRIEF OF RESPONDENT TACOMA NARROWS CONSTRUCTORS** (including this **DECLARATION OF SERVICE**) was served upon:

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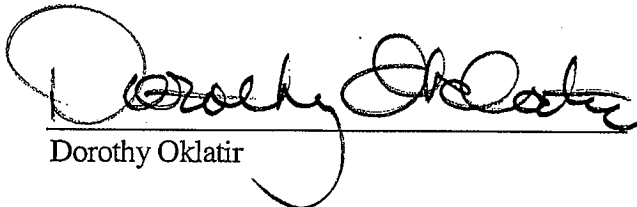
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I hereby certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington, this 1<sup>st</sup> day of May 1, 2008.

  
Dorothy Oklatir

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Case number: Supreme Court Case No. 80259-9

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